(39) (40)

Nos. 03-334, 03-343

Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH
PRESIDENT OF THE UNITED STATES, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF LAW PROFESSORS, FORMER LEGAL ADVISERS OF THE DEPARTMENT OF STATE AND AMBASSADORS, RETIRED JUDGE ADVOCATES GENERAL AND RETIRED MILITARY COMMANDERS, AND OTHER INTERNATIONAL LAW SPECIALISTS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the statutory writ of habeas corpus extends to foreign enemy combatants captured abroad in the course of United States military operations against al Qaeda and the Taliban, who are interned, at Guantanamo Bay Naval Base and other locations outside the United States, as combatants during the ongoing conflict.

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is respectfully submitted[1] by law professors, former State Department Legal Advisers and Ambassadors, retired Judge Advocates General and combatant commanders, and other international law specialists. *Amici* believe that the United States Court of Appeals for the District of Columbia Circuit correctly decided that the statutory writ of habeas corpus is not available to foreign enemy combatants captured and held outside of the United States.

Although the immediate question is jurisdictional, it touches upon the law of armed conflict, and its relationship to constitutional, administrative, and public international law. As lawyers, diplomats, and military professionals who have gained expertise in these matters, we are concerned that the choice of the appropriate legal paradigm may profoundly affect America's ability to defeat al Qaeda's terror campaign against the United States.

SUMMARY OF ARGUMENT

Following the September 11 attacks, Congress authorized the President to use military force against al Qaeda and such "nations, organizations, or persons he determines" assisted al Qaeda's acts of war against the United States. In the midst of a continuing conflict, and in an effort to regulate the President's conduct of the war abroad, petitioners ask the Court to invent an unprecedented and unfounded extraterritorial extension of habeas corpus. Their proposed test of "complete jurisdiction and

[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any party to this action before the Court, or any other person or entity, other than the undersigned *amici*, make a monetary contribution to the preparation or submission of this brief.

control," as the new limit for the writ, could extend to American military installations around the world, occupied territory, and even to combat zones such as Iraq, as well as to other informal and even confidential arrangements between the United States and foreign governments.[2] There would be no apparent limit to this "globalization" of the writ of habeas corpus.

The motive for this proposed legal usurpation is petitioners' assertion that the President's conduct of the war has violated international law, particularly through the capture and wartime internment of enemy combatants at the Guantanamo Bay Naval Station in Cuba. Therefore, the Court's consideration of this case may be assisted by having available the historical and specialized materials that demonstrate the consistency of the President's actions with the principles of international law, including the tradition of the Geneva Conventions.

Claims made that Guantanamo is a "legal black hole" or "rights-free zone" unaccountably ignore the settled rules of the law of armed conflict. That law permits nations to defend their citizens through the use of military force, including the capture and detention of enemy combatants throughout the conflict. Application of these rules does not depend on whether Congress has "declared war" so long as an armed conflict is still in progress. Suggestions that the courts should regulate the capture and detention of foreign combatants abroad would interpose the judiciary in an area the Constitution reserves to the political branches. Neither an activist reading of international law, nor political criticism of the President's wartime strategy, warrants the suggested overthrow of the bright line rule

[2] *Compare Totten v. United States*, 92 U.S. 105, 106-107 (1875) ("public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential" including "all secret employments of the government in time of war").

that limits the statutory remedy of habeas corpus to matters affecting American citizens and matters occurring on American sovereign territory.

ARGUMENT

I. The Law of Armed Conflict Applies to the Conflict Between the United States and Al Qaeda and the Taliban.

The United States has been "at war" at least since September 11, 2001, when agents of the al Qaeda terrorist organization seized four American passenger aircraft, and carried out attacks against the World Trade Center and the Pentagon.[3] Nearly three thousand people were killed; many hundreds more were wounded; the vast majority of the victims were civilians. Al Qaeda reportedly hoped to use the fourth airplane (which crashed in Pennsylvania) to attack the United States Capitol or the White House. The gravity of al Qaeda's attempt to decapitate the American national government in a coordinated set of attacks has led to new post-Cold War consideration of how to preserve the continuity of American democratic government.[4]

Congress responded to these extraordinary acts of war by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or

[3] As the French Ambassador to the United States recently said, his government "immediately viewed [the September 11 attack] as an act of war" and within an hour, "a French resolution was approved by the Security Council branding the act as such and calling for pursuit of the terrorist leaders." Jean-David Levitte, *Setting the Record Straight*, COSMOS CLUB BULLETIN, Feb. 2004, at 15 (reporting the Ambassador's Dec. 1, 2003 discussion at the Cosmos Club).

[4] *See* PRESERVING OUR INSTITUTIONS–THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION (2003), available at <http://www.continuityofgovernment.org/pdfs/FirstReport.pdf>.

persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added). Determining that al Qaeda was responsible for the September 11 attacks, and that the Taliban militia continued to harbor al Qaeda personnel and training camps, the President deployed American military forces to Afghanistan. The legality of the American resort to armed force against al Qaeda and the Taliban was endorsed by the North Atlantic Treaty Organization, the United Nations Security Council (acting under Chapter VII of the U.N. Charter), and the members of the Rio and ANZUS Pacts.[5]

In fact, al Qaeda has targeted American military and diplomatic personnel and American civilians for over a decade. Beginning in 1992, bombing American peacekeepers in Aden, Yemen, al Qaeda rapidly escalated with the 1993 truck-bomb attack on the World Trade Center. This was followed by a 1994 car bomb attack on American soldiers at the Riyadh training center, a 1995 truck bomb attack on the "Khobar Tower" barracks in Saudi Arabia, killing 19 and wounding 372 American soldiers, and the massive 1998 truck bomb attacks on the American Embassies in Kenya and Tanzania, killing 212 and wounding 4500 persons. In January, 2000, al Qaeda attempted (unsuccessfully) to bomb the *U.S.S. The Sullivans*, then

[5] North Atlantic Treaty Organization (NATO), Statement by the North Atlantic Council (Sept. 12, 2001), *reprinted in* 40 I.L.M. 1267 (2001); U.N.S.C. Res. 1368 (Sept. 12, 2001), available at <http://www.un.org/docs/scres/2001/sc2001.htm>; U.N.S.C. Res. 1373 (Sept. 28, 2001), available at <http://www.un.org/docs/scres/2001/sc2001.htm>. The North Atlantic Council invoked Article 5 of the NATO Treaty for the first time in its fifty year history. Similarly, the OAS Foreign Ministers invoked the Inter-American Treaty of Reciprocal Assistance (1947). *See* OAS press release E-194/01, Sept. 21, 2001, available at <http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm>.

refueling in Aden harbor, and successfully attacked the *U.S.S. Cole*, nine months later in the same port. Since September 11, 2001, even after the battlefield successes of American and allied troops in Afghanistan, al Qaeda has continued to target America and its allies around the world.[6] The Taliban has continued to fight American forces in southeastern Afghanistan, despite the formation of a new government in Kabul under Hamid Karzai. Osama bin Laden's 1998 "fatwa" declaring war against all Americans, all Jews, all Christians, and all "apostate" Muslims, still remains in effect, and the United States is still battling al Qaeda around the world.

II. The Law of Armed Conflict and Its Scope.

The law of armed conflict is *lex specialis*, a distinctive branch of international law that takes account of the unique problems of warfare.[7] Sometimes called "international humanitarian law," it draws upon the same normative and ethical commitments as human rights law, attempting to spare innocent civilians and to mitigate the hardship of warfare. However, in weighing the balance, it must also take account of the catastrophic effect of enemy attacks upon the safety and the survival of a nation's civilians. It recognizes that, during war, a state must weigh a complex set of interests – including the need to protect its society and population against physical harm and destruction. As a result, the law of armed conflict permits acts that would be forbidden during peacetime, including killing enemy soldiers in combat, capturing and detaining enemy soldiers on the battlefield, and interning

[6] *See, e.g.*, Raymond Bonner, *Threats and Responses: Detainees; Singapore Announces Arrest of 21 Men Linked to Planned Attacks on U.S. Targets*, N.Y. TIMES, Sept. 17, 2002, at A17.

[7] *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, at ¶ 25 (1996).

enemy soldiers for the duration of the conflict to prevent their return to the fight.[8]

The law of armed conflict's applicability does not depend on whether "war" has been formally declared. *See Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *see also,* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, common art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) ("Convention shall apply to all cases of declared war *or any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them") (emphasis added) [hereinafter Geneva III]. Indeed, many countries no longer formally declare war as such, because of the limitations of the United Nations Charter, but a state of war exists whenever a foreign foe has committed an act of war or aggression. In the Vietnam conflict, the 1991 Persian Gulf War, and the 2003 allied intervention against Saddam Hussein in Iraq, Congress did not formally declare war, but authorized the use of force against foreign foes. Congress also authorized the use of force against al Qaeda and the Taliban.

The law of armed conflict's substantive rules depend both on custom and treaty. Customary law develops from the practice of states recognized as legally obligatory. Especially in this area so important to the survival of

[8] The rights and duties of participants in war and armed conflict are governed by the law of armed conflict. But it is pertinent to note that international human rights law also acknowledges that a "public emergency threatening the life of the nation" may warrant adaptation of the law to meet the emergency. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4, 999 U.N.T.S. 171 (entered into force for the United States, Sept. 8, 1992); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221.

states, customary law crucially depends upon the practice of states. It is not invented by the opinions of individual moralists or law professors.[9]

There is no comprehensive treaty text addressing every wartime issue, and customary law changes in the face of new problems. Multilateral conferences of states crafting treaty texts may unavoidably "fight the last war."[10] The Hague Conventions of 1899 and 1907 foresaw, in the so-called "Martens Clause," that the community of states would not be able to agree on a detailed text to codify a solution to all of the problems of war. (For example, the 1949 Geneva Conventions apply only to conflicts "between two or more of the High Contracting Parties.")[11] Accordingly, the Martens Clause calls upon states to recognize that:

> [u]ntil a more complete code of the laws of war has been issued, . . . in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of

[9] *See United States v. Ramzi Yousef*, 327 F.3d 56, 100-03 (2d Cir. 2003) ("Some contemporary international law scholars assert that they themselves are an authentic source of customary international law, perhaps even more relevant than the practices and acts of States . . . . [This assertion] may not be unique, but it is certainly without merit."). *Accord The Paquete Habana*, 175 U.S. 677, 700 (1900).

[10] Law of war authority Colonel G.I.A.D. Draper noted this problem: "The Geneva Conventions of 1949 are excellent instruments of humanitarian law but they were unfortunately backwards-looking to the experience of World War II." *See* Colonel G.I.A.D. Draper, *The Legal Classification of Belligerent Individuals* (Paper delivered at University of Brussels, 1970), *reprinted in* REFLECTIONS ON LAW AND ARMED CONFLICTS–SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, O.B.E. 196, 199-200 (Michael A. Meyer and Hilaire McCoubrey, eds., 1998).

[11] Geneva III, *supra*, art. 2. Al Qaeda, of course, is not a Geneva party.

> nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

See Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, preamble, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

Of course, the attempt to fit the principles of the Geneva tradition to the raw facts of a terrorist adversary involves human interests on both sides of the equation.[12] The protection of innocent civilians from car bomb attacks is a human rights interest, just as is the protection of combatants caught on the battlefield. Nevertheless, the President has undertaken to treat captured al Qaeda and Taliban detainees humanely and, in accord with the *principles* of Geneva, without conceding that the Geneva Conventions would apply in all their particulars.

III. Al Qaeda and the Taliban are Unlawful and Unprivileged Combatants, and Cannot Claim the Full Privileges of the Geneva Conventions.

As Commander-in-Chief, President Bush has determined that the al Qaeda and Taliban fighters detained at

[12] The Inter-American Court of Human Rights embraced this point in the *Velasquez-Rodriguez Case (Honduras)*, Inter-Am. Ct. H.R. (ser. C, no. 4) (1988), ¶ 172, *reprinted in* 9 HUM. RTS. L.J. 212 (1988), and in 28 I.L.M. 291 (1989). When the Honduran government disclaimed responsibility by arguing that it was not itself running the death squads, the Inter-American Court replied that each government has an affirmative duty to protect the human rights of its citizens, in particular, to guard against the arbitrary deprivation of life by private groups. So, too, the United States government has an affirmative duty, under the laws of war and the principles of human rights, to effectively protect innocent civilians from the private violence of al Qaeda.

Guantanamo Bay are "unprivileged" or "unlawful" combatants. Because of this determination, the detainees are not entitled to the full rights and privileges of prisoners-of-war ("POWs") under the Geneva Conventions. The President properly based this conclusion on the traditional prerequisites of lawful belligerency, as recognized by the Geneva Conventions. Al Qaeda is "an international terrorist group and cannot be considered a state party to the Geneva Convention," and both al Qaeda and the Taliban have failed to satisfy the traditional four-part test of having a responsible commander, wearing a uniform or distinctive insignia, carrying arms openly, and conducting military operations "in accordance with the laws and customs of war." *See* Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), at LEXIS, Legis Library, Fednew File.

Nonetheless, the President has undertaken to treat all internees humanely. *See* Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> ("The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate, and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.").

It must be emphasized that President Bush did not invent the classification of unprivileged or unlawful combatant for the war against al Qaeda and the Taliban. The first modern effort to codify the law of armed conflict, Union Army General Order No. 100, gave prime attention to "unlawful" and "unprivileged" belligerency. General Order No. 100 was drafted by Columbia University law professor Francis Lieber, and promulgated by President Lincoln in 1863. It includes four different categories of unlawful combatants: "armed prowlers," "spies," "highway

robbers or pirates," and "war-rebels."[13] In the Lieber Code, unlawful belligerency meant, at a minimum, that the fighter was "not entitled to the privileges of prisoners of war."[14]

The status of unlawful belligerent or combatant was recognized throughout the nineteenth and twentieth centuries, in the Brussels Declaration of 1874, and again in the Hague Rules of Land Warfare of 1907, and its key distinctions have been preserved in the modern Geneva tradition. *See* Geneva III, *supra*, art. 4. As noted in the official Geneva commentary of the International Committee of the Red Cross, the very definition of "armed forces" depends upon these "material characteristics" and "attributes": "they wear uniform[s], they have an organized hierarchy and they know and respect the laws and customs of war."[15]

The President's conclusion that the members of al Qaeda, and the Taliban, are unlawful combatants is clearly correct. Neither group satisfied the four critical criteria. Indeed, al Qaeda is nothing but a private organization. The law of armed conflict does not authorize

[13] *See* Lieber Code, Instructions for the Government of the Armies of the United States in the Field, arts. 82-85 (Apr. 24, 1863), available at <http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm>.

[14] *Id.*

[15] INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949–COMMENTARY, GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 62-63 (Jean S. Pictet & Jean de Preux eds., 1969). *See also Mohamed Ali and Another v. Public Prosecutor*, 3 All E.R. 488 (P.C. 1968), *reprinted in* HOWARD LEVIE, ED., DOCUMENTS ON PRISONERS OF WAR 757, 763 (U.S. Naval War College 1979) ("It would be anomalous if the requirements for recognition of a belligerent with its accompanying right to treatment as a prisoner of war, only existed in relations to members of [militias or volunteer corps] and there was no such requirement in relation to members of the armed forces.").

violence by private individuals, and private groups are not entitled to the privileges of belligerency – regardless of whether the motivation is ideological, religious, or political. *See* 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 254 (H. Lauterpacht ed., 7th ed. 1952) ("Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces . . . "); CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 127 (Peter DuPonceau, trans. & ed.) (Philadelphia 1810) ("We call pirates and plunderers (praedones) those, who, without authorization of any sovereign, commit depredations by sea or land."); DIETER FLECK (ED.), THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (commentary on Joint Services Regulation 15/2 of the German Bundeswehr), § 304, 71-72 (1995) ("Only states or other parties which are recognized as subjects of international law can be parties to an international armed conflict . . . . combatants are privileged solely by that entitlement . . . ").[16]

The Taliban's status also presents anomalous facts. Although Afghanistan is a party to the 1949 Geneva Conventions, the Taliban was not its legal government or "armed forces." Indeed, the Taliban militia "never claimed to be the Afghanistan government or armed forces" and "exercised none of the usual activities of a government, other than the negative one of closing down all schools."[17]

[16] *See also* HENRY W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 348 (1861) ("individual is liable to punishment" for "any act [otherwise] within the rules of war, not authorised or assumed by his government, as the act of the state"); EMMERICH DE VATTEL, THE LAW OF NATIONS 591, bk. 3, ch. 15 (Dublin, Luke White ed. 1792) (1758) ("The right of making war . . . belongs alone to the sovereign power, which not only decides whether it be proper to undertake the war, and declare it, but likewise directs all the operations . . . . Therefore subjects cannot act herein of themselves, and without the sovereign's order they are not to commit any hostility.").

[17] W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT. L. 493, 506 n.21 (2003). Colonel Parks, of the U.S. Marine

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Neither the United States, the United Nations, the League of Islamic Nations, nor Switzerland (as the treaty depository for the Geneva Conventions) ever recognized the Taliban as Afghanistan's government. The Taliban did not claim Afghanistan's seat in the U.N. General Assembly, and the Security Council openly debated whether a binding Council resolution could be issued against a "non-state entity" such as the Taliban. *See, e.g.*, U.N.S.C. Res. 1333 (Dec. 19, 2000), available at <http://www.un.org/docs/scres/2000/sc2000.htm> (condemning "continuing use of areas of Afghanistan under the control of *the Afghan faction known as Taliban*") (emphasis added). As one widely-respected military law expert has noted, the Taliban was at most "a faction engaged in a civil war in a failed state."[18]

Moreover, even if the Taliban had been a legitimate government, it did not prosecute war in a legitimate way. Taliban combatants targeted civilians, killed journalists, and used civilians and mosques as shields. They acted with perfidy by pretending to surrender – for example, in the Taliban/al Qaeda rebellion at the Mazar-i-Sherif fortress.

The anomalous nature of the parties in the conflict in Afghanistan has important consequences for the application of the Geneva Conventions, and the legal status of the al Qaeda and Taliban members captured by the United States. Unlawful combatants are certainly not entitled to be set at liberty while a war is ongoing, for even lawful combatants may be captured and held for the duration of the armed conflict – including follow-on operations against hold-outs. Unlawful combatants retain protections under

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Corps Reserve (Retired), formerly served as the Special Assistant for Law of War Matters to the Judge Advocate General of the Army.

[18] *Id.* Prior to September 11, 2001, only three governments – Saudi Arabia, Pakistan, and the United Arab Emirates – recognized the Taliban, and each withdrew its recognition following September 11.

the basic norms of customary international law, the Martens Clause, and norms comparable to those in common Article 3 of the Geneva Conventions (applicable to insurgents in civil wars).[19] However, as unlawful combatants, they do not enjoy the full rights and privileges of Geneva POWs.[20] Unlawful combatants are denied the full

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[19] Without dispute, all detainees are entitled to humane treatment. Under the rules of Geneva III, however, lawful combatants would enjoy a number of privileges – such as the right to military pay, the right to have free run of the detention camp and the right to gather *en masse* – that are clearly inappropriate or dangerous in the case of al Qaeda and the Taliban. In addition, under Geneva, lawful combatants may not gain any advantage because they are cooperating. This could pose an obstacle to effective collection of intelligence essential in thwarting future attacks by al Qaeda. Also, classification as a lawful combatant could potentially immunize a non-state-actor from criminal liability for terrorist attacks against American military installations and personnel.

[20] Some writers have suggested that, to assure a "seamless" treaty regime, any unlawful combatant who falls outside the full statutory privileges of Geneva III should automatically gain the privileges and protections of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. *See* Knut Dormann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 85 INT'L REV. RED CROSS 45 (Mar. 2003). But this was not the view of many States Parties. *See, e.g.*, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, at p. 621 (remarks of U.K. delegate: "The whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under the laws of war to which they did not conform.") *See also* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 189 (1998) ("Not all those falling into the hands of a belligerent become prisoners of war or are entitled to prisoner of war status. Enemy civilians, for example, when taken into custody or interned do not fall into this category, and if captured are entitled to treatment in accordance with Geneva Convention IV, 1949, *unless they have taken part in hostile activities when they may be regarded as unlawful combatants and treated accordingly.*") (Emphasis added).

Nonetheless, it is worth recalling that even the Fourth Geneva Convention reflects the exigencies of war. Under Article 5 of that Convention, civilians of the opposing power who are "in occupied

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rights of lawful belligerents so as to create an incentive system for appropriate behavior in wartime. Unlawful combatants cannot exploit legal asymmetry, demanding the privileges that they fail to accord to their adversary. The matter was put plainly by Professor Richard Baxter of Harvard: "International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents." *See* Major R.A. Baxter, *So-called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, BRITISH YEARBOOK OF INTERNATIONAL LAW 1951, at 343. " 'Unlawful belligerency,' " noted Baxter, "is actually 'unprivileged belligerency.' "[21]

IV. United States Policy Is Consistent With the Laws and Customs of War.

Although the Guantanamo detainees are not entitled to the full privileges of Geneva POWs, there are several other practical and legal questions related to their treatment and, with respect to each of these, we believe that American policy is consistent with international law and ethics.

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territory" or "in the territory of an adversary" are subject to internment by decision of the detaining power where they are "definitely suspected of or engaged in activities hostile to the security of the State." Thus, an enemy civilian who is suspected of plotting violence, even if he is not technically a "combatant," could be interned for the duration of the conflict. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 78, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[21] *Accord* JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 549 (1954) (the distinction between "privileged"/"protected"/"lawful" belligerents or combatants, and "unprivileged"/"unprotected"/"unlawful" belligerents or combatants, "draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection").

A. The Right To Intern Captured Combatants, and Permissible Locations

All captured combatants (lawful and unlawful) are legally subject to detention or internment throughout the duration of an armed conflict. *See Ex Parte Quirin*, 317 U.S. 1, 31 (1942); *see also*, Geneva III, *supra*, art. 21 ("The Detaining Power may subject prisoners of war to internment."); Hague Regulations, *supra*, arts. 4-5 ("Prisoners of war are in the power of the hostile Government .... Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits .... "). This internment is not punishment, but a prophylactic measure, the primary purpose of which is to keep a prisoner from returning to the fight. Allowing internment, in fact, strengthens the "life-or-death" battlefield guarantee – that combatants should be permitted to surrender, and that their opponents *must* accept the surrender and "give quarter." In real world settings, many armies would not take prisoners if they knew that the captured enemy would immediately be released, frustrating efforts to defeat the opposing force.

Further, alien enemy combatants have not been entitled to challenge their detention in court.[22] During World War Two, some 400,000 German and Italian prisoners of war were captured and transported to the continental United States for internment, and were repatriated only at the end of the war. Initially, their internment was "indefinite," since neither they nor their captors knew when the war would end. Nevertheless, so far as the case

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[22] Here, citizenship makes a difference of quality and kind. Americans who have fought for a foreign enemy may seek review of any capture and detention by habeas corpus. *See* Remarks by Alberto R. Gonzales, Counsel to the President, before the American Bar Association Standing Committee on Law and National Security, Washington, D.C., Feb. 24, 2004, available at <http://www.abanet.org/natsecurity/judge_gonzales.pdf>.

reports reveal, the federal courts did not entertain any habeas petitions challenging this civil internment, which is simply a normal prerogative of war. The only reported exception is *In re Territo,* 156 F.2d 142 (9th Cir. 1946), which concerned an Italian-American enemy combatant who unsuccessfully asserted that his citizenship should prevent his detention. This dearth of litigation is consistent with the history of the common law. In English common law, alien enemy combatants and alien prisoners of war were plainly excluded from access to the writ of habeas corpus, no matter where they were detained. *See, e.g.*, 9 HALSBURY'S LAWS OF ENGLAND pp. 710-11, ¶ 1212 (2d Ed. 1931-1942) (the writ "will not be granted . . . to an alien enemy who is a prisoner of war").[23]

Although many enemy combatants were transferred to the United States during World War Two, this is not required. Under customary law, and the 1949 Geneva Conventions, the capturing power is merely required to hold detainees at a safe distance from the fighting, lest they "be exposed to the fire of the combat zone." *See* Geneva III, *supra*, art. 23. Captives cannot be held in penitentiaries or detained on naval vessels (to avoid the infamous practice of "prison hulks"). They should be interned in a favorable climate. *Id.* But the detaining power is permitted to choose a place where available security arrangements will discourage any escape or rescue attempts.[24]

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[23] Accord *Rex v. Knockaloe Camp Commandant*, 87 L.J.K.B. 43, 46 (1917) (Avery, J.) ("There is clear authority that a person who is an alien enemy prisoner of war is not entitled to apply to the Court for a writ of habeas corpus."); *Furly v. Newnham*, 2 Doug. K.B. 419 (1780) ("The Court will not grant a habeas corpus ad testificandum to bring up a prisoner of war.").

[24] These constraints may help to explain the choice of Guantanamo as a locale.

B. Screening Combatants: The Safeguards Against Mistakes

No one wishes to have non-combatants, of any nationality, subject to mistaken detention as a combatant. A battlefield can be confusing, and the United States obtained custody of some detained combatants from the Afghan Northern Alliance and other allied groups. To safeguard against mistakes, there has been a careful ongoing process of interviews, screening, and review by American military and intelligence teams, to assure that each person was in fact a combatant. According to the Department of State's Legal Adviser, more than 10,000 detainees were screened in Afghanistan. The "vast majority" were released. *See* William Taft, *Guantanamo Detention is Legal and Essential*, FINANCIAL TIMES, Jan. 12, 2004, at 19. Only a small number were transferred to Guantanamo. As Mr. Taft noted, American policy "was, and is, that only enemy combatants who pose special security, intelligence or law enforcement concerns are transferred to Guantanamo." *Id.*

Screening teams and review panels are the traditional method used to categorize combatants (widely used, for example, in Vietnam and the Gulf War, *see, e.g.*, United States Military Assistance Command Vietnam, Directive No. 381-46, Military Intelligence: Combined Screening of Detainees (Dec. 27, 1967)). The screening and review process for combatants captured in the ongoing conflict in Afghanistan has involved four layers of assessment and review *before* a person may be transferred to Guantanamo. There is an assessment in the field, then another by a military screening team at a central holding area, then a third review by a general officer designated by the combatant commander of Central Command, and then a fourth review by an internal Department of Defense

review panel, including legal advisors and members of the Joint Staff.[25]

Every internee transferred to Guantanamo is again formally reassessed upon arrival, with another review by the Southern Command and then by a panel of experts from the Pentagon, including officials from the General Counsel's office and the Joint Staff. A recommendation is made "whether the detainee should be released, transferred to the custody of a foreign government or continue to be detained."[26] The recommendation is next sent out to an interagency experts group, including officials of the Department of Justice, and then is sent up to the Secretary of Defense or his designee for review.[27] Foreign governments may also be asked for further information concerning their citizens who were captured in the fighting. Even after the completion of this administrative review, it remains a prime objective throughout interviews conducted for military intelligence purposes to revisit the identity of the person, any aliases he may have used (one internee had 13 aliases), and the nature of his martial conduct in Afghanistan and elsewhere. The government has also stated that it will revisit and re-determine status whenever any doubt may newly arise in individual cases.[28]

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[25] *See* Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce, Feb. 13, 2004, transcript available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>, and Briefing by Paul Butler, Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, and Army Major General Geoffrey D. Miller, Commander, Joint Task Force Guantanamo, February 13, 2004, transcript available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html>.

[26] Butler Briefing, *supra*.

[27] *Id.*

[28] *See* Statement by State Department Spokesman Richard Boucher, U.S. Department of State Press Briefing (Feb. 8, 2002), available at <http://www.state.gov/r/pa/prs/dpb/2002/7918.htm>.

Of course, the screening process is more complicated than in other wars. Al Qaeda and the Taliban do not issue identity cards or dog tags, or assign military ranks. There are no official rosters of membership, or records of their deployments. Confirming the captive's status may require his interrogation (permissible under Geneva III), scrutiny of intelligence sources (such as statements of other battlefield detainees, captured documents, or records taken from al Qaeda safe houses and training camps), and even more sensitive sources such as the statements of senior al Qaeda who have begun to cooperate with the United States and its allies. As Secretary of Defense Rumsfeld recently noted, "it takes time to check stories, to resolve inconsistencies, or in some cases even to get the detainee to provide any useful information to help resolve the circumstance."[29]

To supplement the investigative processes and screening, the Secretary of Defense recently announced that he will institute an additional set of safeguard procedures, through administrative review panels.[30] These panels will provide an independent review of each detainee at least annually, to see whether he can appropriately be transferred or released. The inquiry will determine whether the detainee "continues to pose a threat to the United States," but of course, any new information concerning his identity or pre-capture conduct would be pertinent to that determination. The detainee will have the opportunity to appear in person. His foreign government can submit information pertinent to the review, including information on his behalf. Some form of ombudsman, perhaps a lawyer, will be made available "to help the detainee understand what the process and procedures are." The structure of the independent panel, additional review of the panel's

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[29] *See* Rumsfeld Remarks, *supra*.

[30] *Id.*

determination, and methods of assuring that any leads provided by the detainee are appropriately followed-up, are issues presently under consideration.[31] It will be guided by the commitment that the "United States has no desire to hold enemy combatants any longer than is absolutely necessary."[32]

This is a rigorous process, with administrative checks and balances far exceeding the single military field-screening used in many prior conflicts. *Compare* CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW, 1981-1988, at 3455 (Marian Nash Leich, ed. 1995) ("Determination of precise status is accomplished through screening by the capturing or detaining unit commander; in this case, the U.S. Army ground force commander."). This careful and continuous process provides the substantive scrutiny contemplated by the Geneva III treaty. Although the screening has not been called an "Article 5" proceeding, in the language of Geneva III, it provides a searching factual inquiry to protect any person who might have been swept up in a conflict, while protecting the

[31] One or more *amici* have recommended to the Department of Defense that the administrative review boards should be implemented in a way that permits a hearing, once intelligence collection and investigation is complete, at intervals that may be shorter than a year – upon the request of a detainee and the proffer of any new and relevant information. In addition, these *amici* have recommended that the detainee should be given the assistance of a military lawyer or other counselor where necessary to organize or present any information on his behalf. It is a practical challenge to structure a review process, because some information pertinent to a detainee's alleged membership in al Qaeda or the Taliban may derive from highly sensitive sources and methods. The virtue of using a military review board is that it provides the greatest chance of a workable accommodation between the competing claims of the detainee to careful fact-checking, and the public to the protection of intelligence sources needed to thwart future attacks.

[32] Rumsfeld Remarks, *supra*.

public against the careless release of dangerous combatants who will kill more innocent civilians.[33]

There are several misconceptions about the nature and role of so-called Article 5 determinations under Geneva III applicable to conventional wars and lawful belligerency. First, there is no requirement that every combatant detainee should have an Article 5 determination. Rather, in accordance with the treaty's language, Article 5 determinations are used only where, after screening, the detaining power has a remaining "doubt" about a person's legal status. As British law of war authority Colonel G.I.A.D. Draper has noted, "the Detaining Power seems to be the sole arbiter, in good faith, of whether a doubt occurs as to the status of the individual concerned." *See* G.I.A.D. Draper, *supra*, at 220-21 n.23. The same conclusion is reached by Dr. Ameur Zemmali, a Francophone scholar of Islamic law and modern humanitarian law who currently serves as a legal advisor to the International Committee of the Red Cross. Dr. Zemmali has noted, "[t]he doubt envisaged by [Article 5] is an element of which appreciation, subjective by nature, is

[33] Casual release of an al Qaeda combatant may be far more dangerous than the release of a foot soldier in a traditional war, since al Qaeda combatants have been schooled in methods of killing scores of civilians, and have been taught that this is lawful conduct under the fatwas of bin Laden. Deputy Assistant Secretary of Defense Paul Butler, who was formerly an Assistant United States Attorney in the Southern District of New York and a prosecutor in the 1998 Embassy Bombings trial, has noted that "[e]nemy combatants at Guantanamo include not only rank-and-file jihadists who took up arms against the United States, but also senior al Qaeda operatives and leaders, and Taliban leaders." Butler Briefing, *supra*. One example, Mr. Butler has noted, is an "al Qaeda member who was plotting to attack oil tankers in the Persian Gulf using explosive-laden fishing boats." *Id.*

left implicitly at least, to the detaining power. The point of view of the adverse Party is not considered."[34]

Second, Article 5 determinations are focused on legal status, rather than a reconstruction of battlefield conduct. Article 5 speaks of "any doubt . . . as to whether persons, *having committed a belligerent act* and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [of Geneva III]." A typical question concerning legal status would be a deserter from a military unit. In contrast, in the case of the war in Afghanistan, the disqualification from lawful belligerency turns upon the *overall* characteristics of the Taliban and al Qaeda, not individual conduct. Such an overall determination is properly made by the Commander-in-Chief, not by the varying opinions of field grade officers. The President, as Commander-in-Chief, has found, *inter alia*, that al Qaeda and Taliban fighters systematically failed to follow the laws of war, and hence did not qualify for lawful combatancy.

Third, Article 5 determinations are *not* assigned to civilian courts or international tribunals, but rather are made by the military. "No representative of the Protecting Powers appears to have the right to be present," notes Colonel Draper, and there is "no definition of a 'competent tribunal.'" *See* G.I.A.D. Draper, *supra*, at 220-21 n.23. A "properly constituted tribunal" under Article 5 "need not . . . be a court," agrees Canadian authority L.C. Green, who was a British war crimes prosecutor in World War

[34] *See* AMEUR ZEMMALI, COMBATTANTS ET PRISONNIERS DE GUERRE EN DROIT ISLAMIQUE ET EN DROIT HUMANITAIRE (Editions Pedone, Paris 1996) (Ph.D. thesis, Faculty of Law, University of Geneva) ("Le 'doute' envisagé par [Article 5] est un élément dont l'appréciation, subjective par nature, est laissée implicitement au moins, a la Puissance détentrice. Le point de vue de la Partie adverse n'est pas considéré."). The translation in the text above is rendered by counsel to *amici*.

Two.[35] Article 5 panels in U.S. practice typically consist of three military officers. The proceedings are administrative in nature, not civil or criminal, and, under established U.S. practice, the combatant has no right to counsel.

Petitioners Al Odah, *et al.*, offer the remarkable suggestion that the Administrative Procedure Act forbids the President from deciding how to implement the law of war in light of the nature of the conflict, and in particular suggest that it is "arbitrary and capricious" to supplement the Department of Defense joint service rules used for Article 5 determinations in a conventional war,[36] with procedures better suited to an unconventional war.[37]

But this Court's precedents make clear that the President is not considered an "agency" regulated by the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Dalton v. Specter*, 511 U.S. 462, 470-74 (1994).[38]

[35] L.C. Green, *supra*, at 190. *See also* Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, at p. 563: "In the opinion of certain Delegations only a regular Court should be authorized to take a decision in such cases. The majority of the Committee, in spite of its sympathy with this point of view, was unable however to accept it." *Cf.* MARCO SASSOLI AND ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 783-84 (International Committee of the Red Cross 1999) (asking students to consider whether a screening center, such as the Combined Tactical Screening Centers in Vietnam, would as such "satisfy Art. 5(2) of Convention III").

[36] *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, OPNAVINST 3461.6, AFJI 31-304, and MCO 3461.1, at 1-6.

[37] *See Fawzi Khalid Abdullah Fahad Al Odah, et al. v. United States*, Nos. 03-334, 03-343 (Brief on the Merits) at pp. 5, 22 (Jan. 14, 2004).

[38] Petitioners "do not identify which 'agency' of the United States they have in mind." *Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir. 2003) (Randolph, J., concurring).

The capture and internment of enemy prisoners is also the archetype of "military authority exercised in the field in time of war," and thus is expressly excluded by the APA from judicial review. *See* 5 U.S.C. § 701(b)(1)(G); *see also* 5 U.S.C. § 551(1)(G). The rulemaking requirements of the APA – which petitioners apparently would like to apply to the implementation of the Geneva Convention and international customary law – expressly do not apply to "military or foreign affairs function[s]." *See* 5 U.S.C. § 553(a)(1).[39]

Petitioners equally ignore this Court's settled conclusion in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the Geneva Conventions are *not* subject to direct enforcement in the federal courts. As the Court noted, "[t]he obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14.

C. How Long Can Unlawful Combatants Be Interned?

The Court's intervention is also sought because some detainees were captured more than two years ago. But active hostilities still continue in Afghanistan, with Taliban infiltration in the southeast, and al Qaeda continues to target Americans and U.S. allies around the world. The difficulty in stating when this war will end, of course, is exacerbated because the principal adversary is a non-state-entity. There is no government that can enter into a peace agreement or order its soldiers to demobilize. Indeed, Osama bin Laden has taught al Qaeda recruits that continuing to wage a violent jihad against Americans, Christians, Jews, and "apostate" Muslims is a religious duty.

[39] There is a parallel exemption for the decisions of "military commissions." *See* 5 U.S.C. § 701(b)(1)(F) and (G).

Nonetheless, the law of armed conflict permits captured al Qaeda and Taliban members to be held until the close of active hostilities, *compare* Geneva III, *supra*, art. 118, and it would make little sense to require the release of combatants who openly boast that they will continue to attack Americans whenever the opportunity arises. As State Department Legal Adviser William Howard Taft IV has noted, "All wars last too long. Releasing captured combatants to return to the fight would make them last longer."[40]

Moreover, the periodic administrative reviews of status, instituted by the United States, will permit the identification of individuals who are less likely to continue the fight if released, and as the backbone of the al Qaeda organization is broken, many more al Qaeda and Taliban recruits may be willing to rethink their positions.

D. Trial of Unlawful Combatants in Military Commissions

Claims that the Guantanamo detainees have been consigned to a legal "black hole" are further undercut by the President's order of November 13, 2001, and the implementing rules of March 2002, providing for the trial of certain members of al Qaeda in military commissions. These criminal prosecutions are distinct from the civil internment of a combatant until the end of a conflict. The President has a duty, as a commander, to enforce the law of war, and it is a long-standing practice to try war crimes in a military commission. This was the venue used for criminal trial of enemy combatants in World War Two. The Nuremberg Trials took place in a military tribunal, and Geneva III Article 84 actually *requires* that the trials of

[40] Taft, *supra*.

traditional prisoners of war must take place in military tribunals, rather than civilian courts.

Congress has recognized and acknowledged the President's power to convene military commissions, in the course of its revision of the code of military courts-martial in 1920 (then called the "Articles of War"), in the passage of the Uniform Code of Military Justice in 1950, and in the passage of the 1996 War Crimes Act.[41] Article 15 of the 1920 Articles of War stated that "[t]he provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute *or by the law of war* may be triable by such commissions." Articles of War, art. 15, in Pub. L. No. 242, ch. 227, 41 Stat. 787, 790 (1920) (emphasis added). The military commissions of World War Two were conducted without any further specific legislative authority from the Congress, though some observers have been misled on this point by the use of the phrase "Articles of War" for the general revision of the military criminal code in 1920.[42] The language of Article 15 was carried forward into 10 U.S.C. § 821, as part of the 1950 Uniform Code of Military Justice, and provides equally strong authority for the commissions established by President Bush.

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[41] *See generally*, Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT. L. 328 (2003).

[42] *See Shafiq Rasul et al., v. Bush, et al.*, No. 03-334 (Brief on the Merits), at 30-31 (Jan. 14, 2004); Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFFAIRS 7 (Jan.-Feb. 2004) ("[T]he government in *Quirin* was operating under a specific grant of authority from Congress . . . . "); Harold Koh, *The Case Against Military Commissions*, 96 AM. J. INT. L. 337, 340 & n.20 (2002) ("In *Quirin*, Congress . . . had specifically authorized the use of military commissions in its Articles of War.").

The Secretary of Defense has published detailed rules for the conduct of such trials, with careful procedural protections, including proof beyond a reasonable doubt, presumption of innocence, the defendant's right to cross-examine witnesses, the right to call defense witnesses, the right to production of exculpatory evidence, the right to choice of military defense counsel, the right to retain civilian counsel, and the right of appeal to an independent appellate panel.[43] The trials will be open, except on occasions when classified evidence must be presented, and military defense counsel will be present whenever any evidence is considered. The appellate panel has independent authority to reverse and remand a conviction for serious errors of law in the conduct of the trial.[44] Current appellate panel appointments include a former U.S. Attorney General, a former Cabinet officer, a state chief justice, and a former state attorney general.

To be sure, the military tribunals' rules permit the consideration of a broader range of evidence than is permitted in federal jury trials (namely, any evidence that has "probative value to a reasonable person"), but that is also the standard for admissibility used by European courts and the United Nations war crimes tribunals. The

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[43] The procedural rules for commission trials are published on the Internet. *See* Department of Defense Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism*, Mar. 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

[44] In announcing the appellate rules, a senior defense department official reaffirmed that, "[t]he opinions of the review panel, when the review panel sends a case back down for further proceedings or for dismissal of charges, those are binding." *See* Department of Defense Briefing, Dec. 30, 2003, available at <http://www.defenselink.mil/transcripts/2003/tr20031230-1081.html>. *See also* Department of Defense Military Commission Instruction No. 9, *Review of Military Commission Proceedings*, Dec. 26, 2003, available at <http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf>.

weight of the evidence must still satisfy the demanding standard of proof beyond a reasonable doubt. With the publication of carefully-drawn "Elements of Crimes,"[45] and the designation of a widely-respected Army Major-General (Retired) as Appointing Authority, preparations for the beginning of a trial process are complete. The time taken in framing fair procedural rules will serve well,[46] and several battlefield detainees have been referred for possible prosecution, with the appointment of defense counsel. Two prosecutions have now begun.[47] The vigor of the defense that can be expected from military defense counsel before the military commissions is shown by the *amicus* brief filed by several of those defense counsel in the instant case before this Court.

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[45] *See* Department of Defense Military Commission Instruction No. 2, *Crimes and Elements for Trials by Military Commission*, Apr. 30, 2003, available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>.

[46] *See* Ruth Wedgwood, *Al Qaeda and American Self-Defense*, (Appendix) in SEPTEMBER 11, TERRORIST ATTACKS, AND U.S. FOREIGN POLICY 176-78 (Demetrios James Caraley, ed., The Academy of Political Science, 2002) (reprinting Joint Statement of Individual High-Level Advisors to the Secretary of Defense).

The procedural rules are consistent with the standards for fair trial set out in Geneva Convention IV, *supra*, arts. 72-75, and with Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, art. 75 (albeit the United States is not a party to Protocol I). It should be noted that military commissions are, in principle, a venue in which any member of the armed forces can be tried for war crimes, although the prevailing practice is to use courts-martials. *Cf.* Geneva III, *supra*, art. 102.

[47] On February 24, 2004, Guantanamo detainees Ali Hamza Ahmed Sulayman al Bahlul of Yemen and Ibrahim Ahmed Mahmoud al Qosi of Sudan were charged with conspiracy to commit war crimes. *See* Two Guantanamo Detainees Charged, United States Department of Defense News Release No. 122-04, Feb. 24, 2004, available at <http://www.defenselink.mil/releases/2004/nr20040224-0363.html>.

V. Conclusion

The political branches inevitably play a central role in shaping the content of international law – both in framing the state practice that aids the evolution of customary international law, and in the application of treaties in a world where foreign adversaries may not respect the same norms. The power of the Presidency to make battlefield decisions is essential in protecting the United States against an adaptable foe that has recruited and trained young men to conduct a violent jihad against innocent civilians. This power of the Commander-in-Chief includes the traditional prerogative of restraining captured enemy forces who would otherwise return to the fight.

As this Court recognized in *Eisentrager*, the Geneva Conventions are *not* subject to direct enforcement in the federal courts. "[T]he obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." 339 U.S. at 789 n.14. This sound judgment recognizes that the primary engine of enforcement must remain the reciprocal interest shared by all states in the humane conduct of war. After careful consideration, the President concluded that al Qaeda and the Taliban were unlawful combatants in their fight to maintain control of Afghanistan, and this was a reasonable judgment.

The American commitment to the decent treatment of all persons in its custody remains a centerpiece of our foreign policy, including in the war against terrorism. The struggle against terrorism will be won in large part by our devotion to the ideals of this country's founding. But we must also win on the battlefield. Even lawful foreign enemy combatants are not entitled to use the courts of their adversary in order to fight the war. It would be an extraordinary extension of the judicial role for the courts to create a roving supervisory jurisdiction over the conduct

of American foreign policy and military operations around the globe. The President's determination to abide by the principles of Geneva gives no occasion for this Court to revolutionize the reach of statutory habeas corpus.

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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